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Supreme Court, U.S.
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No. 97-745

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KENNETH P. CHOINA, SR.,
Petitioner,

v.

E.I. DU PONT DE NEMOURS & CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LUTHER ZEIGLER
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

LAWRENCE E. ABBOTT
DEBORAH D. KUCHLER
ABBOTT, SIMSES, KNISTER & KUCHLER
400 Lafayette Street, Suite 200
New Orleans, LA 70130
(504) 568-9393

Attorneys for Respondent

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours & Company ("DuPont") has no parent company. There are five publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada, Inc. and DuPont Photomasks, Inc. are subsidiary companies, and Hudson Technologies, Inc., Shaman Pharmaceuticals, Inc., and DNAP Holding Corporation are companies in which DuPont holds a minority, non-controlling interest.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is unpublished, but is reprinted in the Appendix to the Petition at pages 1a-10a.

COUNTERSTATEMENT

The basic facts of the case are accurately set forth in the opinion below. Pet. App. at 2a-5a. The facts relating to the Rule 60(b) hearing before the district court, which is the subject of the Petition, are set forth in the district court's order. Pet. App. 12a-14a.

REASONS FOR DENYING THE WRIT

Petitioner's expert witness perjured himself on the witness stand by presenting marketing data he knew to be false in an attempt to bolster Petitioner's inflated damages theory. Based on this perjured testimony, the jury awarded Petitioner substantial damages. Promptly after discovering the perjury, which was confirmed when the deposition of the expert's assistant was taken immediately after trial, Respondent moved the district court pursuant to Fed. R. Civ. P. 60(b)(6) for relief from the final judgment. Persuaded by clear and convincing evidence that Petitioner's expert had perpetrated a fraud upon the jury, the district judge granted the motion, set aside the verdict, and ordered a new trial. Pet. App. 12a-14a.[1] On appeal, a unanimous panel of the Fifth Circuit affirmed the trial court's ruling, finding that the district judge had not abused her discretion in concluding that the expert's perjury was material to the jury's verdict and well within the class of "other reason[s] justifying relief" contemplated by Rule 60(b)(6). Pet. App. 5a-8a.

The courts below correctly decided this case. Moreover, the decision is consistent with the language and purpose of Rule 60(b)(6), as well as with this Court's cases construing the rule's scope. This case presents neither a substantial issue of federal law warranting this Court's review

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[1] The district court held that there was insufficient evidence that Petitioner was complicit in its expert's fraud. Pet. App. at 13a. Accordingly, Clause (3) of Rule 60(b), which addresses the fraud of "an adverse party," was not available as a basis for relief. The question whether the fraud of an expert should be deemed as a matter of law to be the fraud of the party under clause (3) was not addressed by the courts below.

nor a question over which the lower federal courts are divided. Rather, the judgment below is a straightforward exercise of a trial court's discretion to relieve a party from a judgment when reasons other than those specifically prescribed by clauses (1) through (5) of Rule 60(b) justify such relief. This is precisely the intended purpose of clause (6), which is designed to give the trial court the power to set aside or modify a judgment for any "other reason justifying relief."

Noting that "[t]he Rule does not particularize the factors that justify relief," this Court has repeatedly emphasized the considerable discretion afforded trial courts under this rule "'to vacate judgment[s] whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847, 863-64 (1988), *quoting in part Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Here, the trial judge found that "the sole evidence supporting [the jury's] multi-million dollar verdict [was] the clearly fraudulent testimony of an expert witness who supplied Defense counsel with fraudulent documents that prevented Defendant from fully presenting its case." Pet. App. at 13a.[2] Heeding this Court's admonition to "consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process" (*Liljeberg*, 486 U.S. at 864), the district judge

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[2] That Mr. Trappey's perjured testimony was critical to the jury's verdict is demonstrated by the extraordinary difference in the verdicts returned in the second and third trials. When the jury was permitted to rely on the fraudulent testimony, it returned a verdict of $11.3 million. On re-trial, when Petitioner was required to rely on unfalsified marketing results, the verdict was $176,000.

determined that permitting a fraudulently obtained verdict to stand in these circumstances would offend "the entire judicial system" and "cause substantial injustice." Pet. App. at 13a. As the court of appeals correctly held, this determination was an entirely appropriate exercise of discretion by a district judge who heard the perjured testimony herself and could, better than any reviewing court, assess its effect on the jury.

It is well-established that Rule 60(b)(6) reaches the kind of egregious fraud that occurred here. Indeed, cases of perjured or fraudulent testimony by a third-party witness are one of the "few narrowly-defined situations that *clearly present* 'other reasons justifying relief.'" 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE §2864, at 351-53 (2d ed. 1995) (emphasis added). In these circumstances, courts rely on Rule 60(b)'s residual clause (6) since clause (3) by its terms appears to extend only to the fraud of "an adverse party."[3] As Professor Moore explained in the second edition of his treatise: Given "that a judgment produced by the fraud, misrepresentation, or other misconduct of an independent third person is unjust and that a court should not be impotent to grant relief, we believe that relief should be given under some provision other than 60(b)(3), *and that the Rule does afford the means for relief . . . under residual clause (6). . . .*" 7 J.W. Moore, MOORE'S FEDERAL PRACTICE §60.24[5], at 60-216 (2d ed. 1996) (emphasis added).

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[3] Some courts have concluded that the fraudulent testimony of an expert witness is attributable to the party who presented the witness, and have treated it under clause (3), even in the absence of direct evidence that the party participated in the fraud. *See Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1505 (11th Cir. 1985), *modified at* 866 F.2d 1303, 1304 (11th Cir. 1989). So far as we can tell, no court has suggested that *no* clause of Rule 60(b) affords relief in these circumstances.

Accordingly, federal courts across the country, like the district court and court of appeals here, have had no difficulty acknowledging that Rule 60(b)(6) applies in cases of fraud by non-party witnesses, including experts. *See, e.g., Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985) (relief under Rule 60(b)(6) may be available where a judgment is procured through the false testimony of a non-party); *Viskase Corp. v. American Nat'l Can Co.*, 1997 WL 619862, at *8 (N.D. Ill. Sept. 29, 1997) (ordering a new trial pursuant to Rule 60(b)(6) based on false testimony given by an "outside expert witness"); *Lester v. Empire Fire & Marine Ins. Co.*, 87 F.R.D. 466, 467 (E.D. Mo. 1980), *aff'd*, 653 F.2d 353, 354 (8th Cir. 1981) ("perjury by a nonparty witness should be dealt with pursuant to subsection (b)(6)"); *Armour & Co. v. Nard*, 56 F.R.D. 610, 612 (N.D. Iowa 1972) (same).[4]

1. Largely disregarding the foregoing authority, the first question presented by the Petition seeks to create the appearance of a conflict within the circuits by arguing that the holding below -- that fraud by a third-party witness may be grounds for relief under Rule 60(b)(6) -- is contrary to the Second Circuit's opinion in *Simons v. United States*, 452 F.2d 1110 (2d Cir. 1971). This is incorrect. In *Simons*, the court of appeals did not rest its holding on Rule 60(b)(6) and, in any event, the fraud at issue there was not the fraud of a third-

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[4] In footnote 12, the Petition recognizes the many cases that have suggested that "fraud by a witness or a nonparty is potential grounds for relief under Rule 60(b)(6)," but says that "each such statement was dicta" and that no court has granted relief on this basis. This is not true. For instance, in *Viskase*, a case not cited by Petitioner, the district court granted a Rule 60(b)(6) motion based on an expert witness' fraudulent testimony and ordered a new trial. 1997 WL 619862, at *8 (N.D. Ill. Sept. 29, 1997). Indeed, that case presents close parallels to this one.

party witness. Rather, *Simons* involved a motion brought by *the party who committed a fraud on the court* seeking to overturn the naturalization decree that she had obtained decades earlier through her own misconduct. The case is utterly inapposite and its reasoning is certainly not at odds with the Fifth Circuit's decision here.[5]

Specifically, in *Simons*, a foreign-born widow attempted to set aside a naturalization decree that she and her late husband had obtained 22 years earlier from the United States District Court for the Southern District of New York. By undoing her naturalization, she hoped to maximize her chances of becoming eligible to share in her deceased husband's large estate under Dutch law. 452 F.2d at 1112 & n.1. Her claim was that, at her husband's urging, she had knowingly misrepresented her intention to take up permanent residence in the United States in her original naturalization petition; in fact, she now alleged, she had never intended to reside permanently in this country. In order to set aside her naturalization, she (1) filed an independent action in federal district court asking for an order that at no time was she or her husband a lawful citizen of the United States, and (2) filed motions in her original (long since closed) naturalization proceeding asking for the same relief. 452 F.2d at 1112.

The district court in *Simons* sua sponte dismissed the independent action on the ground that "Mrs. Simons was estopped from maintaining the action because of her long acceptance of benefits of American citizenship." 452 F.2d at 1112. The trial court "also effectively denied Mrs. Simons'

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[5] Although Petitioner places great reliance on *Simons* in this Court, the case was never cited to the courts below.

motions in the naturalization proceedings, for it deemed these to be mere 'surplus' in light of the independent action initiated by her complaint." *Id.*

On appeal, the Second Circuit affirmed, but for slightly different reasons. It held that Mrs. Simons' independent action was barred by Section 340 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451. 452 F.2d at 1116. As to her motions for post-judgment relief in her naturalization proceeding, the court of appeals held that these were properly denied by the district court. The appellate court observed that Fed. R. Civ. P. 60(b) provided the only possible basis for such relief and, since Mrs. Simons' claim was for fraud, only clauses (3) and (6) might apply. 452 F.2d at 1115. However, the court held, clause (3) could not apply, because her claim was based on her own fraud, not the "fraud of an adverse party," as required by (3). *Id.* And as for clause (6), the Second Circuit noted that, even assuming Mrs. Simons had made such a claim,[6] it was presented far too late:

> Since clause (3) permits relief only for fraud of an adverse party and only if the motion is made within one year, it would be reading clause (6) most perversely to say that it authorizes attack for one's own or a non-adverse party's fraud *twenty-two years after the judgment.*

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[6] The district court's opinion makes plain that Mrs. Simons moved for relief under Rule 60(b) only pursuant to clauses (1) through (3) -- *not* pursuant to clause (6). *Simons v. United States*, 333 F. Supp. 855, 864 n.12 (S.D.N.Y. 1971) ("As alternative grounds to support her position, *plaintiff invokes clauses 1 through 3 of Rule 60(b)*") (emphasis added).

Id. (emphasis added).[7] In any case, the court concluded, "[w]hether clause (6) might authorize attack by motion on one's own naturalization by a person tricked or forced into petitioning for *is a question we need not decide, since Mrs. Simons' motion made no such claim.*" 452 F.2d at 1115-16 (emphasis added).

In sum, *Simons* has no bearing on the propriety of the decision below and is plainly not in conflict with it. The court of appeals in *Simons* did not rest its decision on Rule 60(b)(6). Moreover, in its discussion in *dicta* of that issue, what the Second Circuit found "most perverse" was not, as the Petition suggests (at 12), using Rule 60(b)(6) to set aside a judgment obtained by a party through the fraud of its expert witness; rather, what was perverse was Mrs. Simons' attempt to invoke Rule 60(b) to set aside a judgment in her favor based on her own fraud made in a motion filed 22 years too late. Petitioner's suggestion of a conflict between *Simons* and this case is disingenuous.

2. Equally unpersuasive is the Petition's suggestion of a conflict between the decision below and the D.C. Circuit's opinion in *Richardson v. National R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995). Pet. at 12. The Petition includes a parenthetical explanation of *Richardson* that reads: "*questioning* whether 'misconduct by a witness other than an 'adverse party' could constitute grounds for relief under' Rule 60(b)(6)". *Id.* (emphasis added). This does not fairly describe the D.C. Circuit's discussion of this issue. To the contrary, the court of appeals in *Richardson* expressly acknowledged that fraud by an expert witness *could* give rise to relief under Rule

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[7] The Petition ultimately acknowledges in a footnote that the basis for the Second Circuit's reasoning on the Rule 60(b) issue was the *untimeliness* of Mrs. Simons' motion (Pet. at 11 n.11), not the unavailability of relief under clause (6).

60(b)(6), even though it was not warranted on the evidence presented in that case:

> Rule 60(b)(6) admittedly gives the district judge broad latitude to relieve a party from a judgment for 'any other reason justifying relief from the operation of a judgment.' *And it may be that in the appropriate case misconduct by a witness other than an 'adverse party' could constitute grounds for relief under this standard.*

49 F.3d at 765 (emphasis added). In short, far from creating a conflict, the D.C. Circuit's decision in *Richardson* plainly recognizes that there may be cases in which Rule 60(b)(6) should be extended to misconduct by a non-party witness. It is in accord with the Fifth Circuit's decision here.[8]

3. Petitioner's alternative argument that Rule 60(b)(3) "occupies the field with respect to fraud and preempts any application of Rule 60(b)(6) to fraud by a nonparty" (Pet. at 15) is bizarre. We are aware of no case that so holds and Petitioner cites none. Rule 60(b)(3) merely articulates one of the prescribed bases for obtaining relief from a judgment -- *i.e.*, where there is fraud or other misconduct by "an adverse party." There is nothing in the language of the clause, the Advisory Committee notes, or the case law, supporting the claim that Congress intended to "occupy the field with respect to fraud" in enacting this provision or intended to limit the

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[8] Petitioner also makes a half-hearted attempt to argue that the Fifth Circuit's decision is in tension with a line of Sixth Circuit cases. Pet. at 13 n.13. This "conflict" is also an imagined one. The cases cited do not concern fraud by an expert witness and there is literally nothing in them to suggest that Rule 60(b)(6) could not or should not be applied in such circumstances.

relief available under clause (6). Affording district courts the latitude to address the full range of "extraordinary circumstances" that may require relief from a judgment, but that are not specified by clauses (1) through (5), is exactly the purpose of clause (6). *Liljeberg*, 486 U.S. at 863-64.

Under Petitioner's reading of clause (6), a district judge would be powerless to remedy under Rule 60(b) fraud by anyone other than an adverse party. As one leading commentator has explained, however, the cases are clear that, although "[f]raud by the party's own counsel, by a codefendant, or by a third-party witness does not fit within clause (3) of the rule, which requires fraud by an adverse party," relief is available and may be "granted under clause (6) instead." 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE §2864, at 353 (2d ed. 1995).

4. Much of the Petition is devoted to a byzantine discussion of the interplay between clause (6) of Rule 60(b) and its first five clauses, particularly clause (3). This interplay may have some significance in cases where a motion is made more than a year after the judgment, since motions under clauses (1) through (3) must under the Rule be made within one year. Because of this limitation, litigants who have sought post-judgment relief more than one year after the judgment have occasionally tried to disguise their motions as coming under clause (6), when in reality they are premised on one of the first three clauses. This Court has expressly disapproved such tactics and has held that a motion under clause (6) cannot be "premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg*, 486 U.S. at 863 & n.11.

None of these concerns are present here, however, since Respondent's motion was made promptly following trial. Pet. App. at 3a. In such cases, "it is not important to decide

whether the motion in fact comes under clause (6) or under one of the earlier clauses. These prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise." 11 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE §2864, at 355-57 (2d ed. 1995). *See also* 7 J.W. Moore, MOORE'S FEDERAL PRACTICE §60.27[2], at 60-273-74 (2d ed. 1996) (when the motion under clause (6) is timely, "it is not critical to determine whether the reason is contained in any of the preceding clauses; and attention may be focused on a determination as to whether the reason justifies relief"). Here, the evidence overwhelmingly supported the district court's judgment, affirmed by the court of appeals, that justice required that the fraudulently procured verdict be set aside.

5. The second question presented by the Petition -- whether Respondent exercised "due diligence" in "uncovering the fraud" that formed the basis of its Rule 60(b)(6) motion -- is also not worthy of this Court's review. It raises no important question of federal law, but merely invites this Court to re-assess a factual issue that has already been presented to, and properly resolved by, both the district court and the court of appeals. Such an issue is not an appropriate basis for an exercise of this Court's certiorari jurisdiction. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, the court of appeals was plainly correct in its conclusion that Respondent "took appropriate steps after learning of Trappey's perjury." Pet. App. at 8a. Contrary to Petitioner's suggestion, Respondent learned of the possibility

of fraud by Petitioner's expert "only hours" before he took the stand. *Id.* Respondent could not confirm the perjury until it deposed the expert's graduate assistant after trial. Once the perjury was established, Respondent promptly filed its Rule 60(b)(6) motion in the district court. As both courts below held, there is no basis for finding a lack of diligence on these facts.

Finally, *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990), discussed in the Petition at pages 22-23, is also of no help to Petitioner. In that case, Merrell Dow sought to set aside a three-year old judgment under District of Columbia Superior Court Rule 60(b)(6) on the ground that plaintiff's expert witness had misrepresented his qualifications at trial. Although the Court of Appeals agreed that the expert misrepresented his qualifications in certain respects, it held that these misrepresentations did not affect the substance of his testimony and therefore were not material to the jury's verdict in plaintiff's favor. 563 A.2d at 336 ("we hold that Judge Wolf erred in concluding that Dr. Done's misrepresentation about his faculty status would have affected the outcome of the trial"). That is a far cry from this case, where the fraudulent testimony of Petitioner's expert was, as the district court found, "the sole evidence supporting [the jury's] multi-million dollar verdict. . . ." Pet. App. at 13a.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LUTHER ZEIGLER
Counsel of Record
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

LAWRENCE E. ABBOTT
DEBORAH D. KUCHLER
ABBOTT, SIMSES, KNISTER & KUCHLER
400 Lafayette Street, Suite 200
New Orleans, LA 70130
(504) 568-9393

Attorneys for Respondent

December 31, 1997